



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

March 2, 1983

LEGISLATIVE REFERRAL MEMORANDUM

TO:

Legislative Liaison Officer

Department of Education

Department of the Treasury

Department of Health and Human Services

Department of Transportation

Department of Labor

Department of the Interior

Department of Agriculture

Department of Energy

Department of Defense

Department of Housing and Urban Development

Department of Commerce

Department of State

Veterans Administration

General Services Administration

National Aeronautics and Space Administration

Federal Emergency Management Agency

Central Intelligence Agency

Small Business Administration

SUBJECT: Section 1301 of Justice draft bill on criminal reform

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than Noon, March 4, 1983.
ORAL COMMENTS ACCEPTABLE.

Direct your questions to Gregory Jones (395-3802), of this office.


James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: Maurice White
Hilda Schreiber

Cecelia Wirtz

K. Wilson

TITLE XIII

FEDERAL TORT CLAIMS ACT AMENDMENTS

SEC. 1301. Subsection (b) of section 1346 of title 28, United States Code, is amended --

(1) by inserting "(1)" after "jurisdiction of"; and

(2) by striking out the period at the end thereof and inserting in lieu thereof ", or (2) civil actions on claims against the United States, for money damages, sounding in tort arising under the Constitution of the United States for injury or loss of property, or personal injury or death, caused by an act or omission of any employee of the Government while acting within the scope of his office or employment, such liability to be determined in accordance with applicable Federal law."

SEC. 1302. (a) Section 2672 of title 28, United States Code, is amended in the first paragraph --

(1) by inserting "(1)" after "United States" the first place it appears;

(2) by striking out the colon after "occurred" and inserting in lieu thereof ", or (2) for claims for money damages sounding in tort arising under the Constitution of the United States for injury or loss of property, or personal injury or death, caused by an act or omission of any employee of the Government while acting within the scope of his office or employment, such liability to be determined in accordance with applicable Federal law:";

(3) by inserting "or any award, compromise, or settlement based on a claim arising under the Constitution of the United States" after "\$25,000"; and

(4) by striking the figure "\$25,000" and substituting therefore the figure "\$50,000".

(b) The third paragraph is amended by inserting between the word "made", the second time it appears, and the word "by", the words "or approved", and by inserting between the word "to", the fourth time it appears, and the word "section", the words, "this section or".

SEC: 1303. Section 2674 of title 28, United States Code, is amended --

(1) by striking out the comma after "claims" in the first paragraph and inserting in lieu thereof "other than those arising under the Constitution of the United States,";

(2) by inserting "(a)(1)" at the beginning of the first paragraph;

(3) by inserting "(2)" at the beginning of the second paragraph; and

(4) by adding at the end thereof the following new subsection:

"(b)(1) The United States shall be liable, respecting the provisions of this title relating to tort claims arising under the Constitution of the United States, to the extent recognized or provided by applicable Federal law, and shall be entitled to all defenses heretofore available to an employee of the United States and

to which the United States would otherwise be entitled. The United States shall not be liable for interest prior to judgment or for punitive damages.

"(2) Damages in any such case shall be the greater of (A) actual damages or (B) liquidated damages of \$1,000 or, in the case of a continuing tort, \$100 a day for each day of violation up to a maximum of \$15,000."

SEC. 1304. Subsection (a) of section 2675 of title 28, United States Code, is amended by striking out the comma after "employment" and inserting in lieu thereof "or upon a claim against the United States for money damages for a tort arising under the Constitution of the United States caused by an act or omission of any employee of the Government while acting within the scope of his office or employment,".

SEC. 1305. (a) Subsection (b) of section 2679 of title 28, United States Code, is amended to read as follows:

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for claims for injury or loss of property or personal injury or death resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment and for claims arising under the Constitution of the United States for an act or omission of any employee of the Government while acting within the scope of his office or employment, is exclusive of any other civil action or proceeding arising out of or relating to the same subject matter against the employee whose act or omission gave rise to the claim, or against the estate of such employee, and shall also be

deemed an equally effective substitute for any recovery against the employee in his individual capacity directly under the Constitution."

(b) Subsection (d) of such section is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the action arose, any such civil action or proceeding commenced in a United States district court shall be deemed an action against the United States under the provisions of this title and all reference thereto and the United States shall be substituted as the party defendant. After substitution, the United States shall have available all defenses heretofore available to the employee and all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b) of this title.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the action arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending. Such action shall be deemed an action brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as

the party defendant. After substitution, the United States shall have available all defenses heretofore available to the employee and all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b) of this title. The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

"(3) The certification by the Attorney General under subsection (d)(1) or (2) that the defendant employee was acting within the scope of his office or employment shall be binding and conclusive, except that in the event that the Attorney General has not certified scope of office or employment, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. A copy of the petition shall be served upon the United States in accordance with the provisions of rule 4(d)(4), Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding shall be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending. Should the district court determine that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

"(4) Where a civil action or proceeding under this chapter is precluded because of the availability of a remedy, compensation, or other benefits from the United States as provided by any other

law, the action or proceeding shall be dismissed but in that event, the running of any limitation of time for commencing or filing an application or claim in a proceeding for any such other remedy, compensation, or benefits shall be suspended during the pendency of the civil action or administrative proceeding under this chapter.

"(5) Whenever an action brought against a defendant employee in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim to the appropriate Federal agency pursuant to section 2675(a) of this title, the claim shall be deemed to be timely presented under section 2401(b) of this title, if (A) the claim would have been timely if filed on the date the action against the defendant employee was commenced, and (B) the claim is presented to the appropriate Federal agency within sixty days after dismissal of the action."

(c) Such section is further amended by adding at the end thereof the following new subsection:

"(f) If a civil action or proceeding under section 1346(b) or 2672 of this title arising under the Constitution of the United States results in a judgment against the United States or an award, compromise, or settlement paid by the United States, the Attorney General shall forward the matter to the head of the department or agency which employed the employee at the time of the act or omission for such further administrative investigation or disciplinary action as may be appropriate."

(d) Such section is further amended by adding at the end thereof the following new subsection:

"(g) The head of an agency or his designee may, to the extent that he or his designee deems appropriate, hold harmless or provide liability insurance for any person described in subsection (b) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission while acting within the scope of such person's office or employment."

SEC. 1306. (a) Section 2680 of title 28, United States Code, is amended --

(1) by striking out the section heading and inserting in lieu thereof the following:

"§ 2680. Exceptions; claims not arising under the Constitution of the United States";

(2) by inserting ", relating to tort claims other than those arising under the Constitution of the United States," in the first paragraph immediately after "title"; and

(3) by amending subsection (h) to read as follows:

"(h) Any claim arising out of libel, slander, misrepresentation, deceit, or interference with contract rights."

(b) The item relating to section 2680 in the table of sections at the beginning of chapter 171 of title 28, United States Code, is amended to read as follows:

"2680. Exceptions; claims not arising under the Constitution of the United States."

SEC. 1307. (a) Chapter 171 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 2681. Exceptions; claims arising under the Constitution of the United States

"The provisions of this chapter and of section 1346(b) of this title which relate to tort claims arising under the Constitution of the United States shall not apply to actions arising from the activities of the Tennessee Valley Authority, the Panama Canal Company, a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives."

(b) The table of sections at the beginning of chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"2681. Exceptions; claims arising under the Constitution of the United States."

SEC. 1308. (a)(1) Subsections (a) through (d) of section 4116 of title 38, United States Code, are repealed.

(2) Subsection (e) of such section is amended --

(A) by striking out "(e)";

(B) by striking out "person to whom the immunity provisions of this section apply (as described in subsection (a) of this section)," and inserting in lieu thereof "employee of the Veterans' Administration"; and

(C) by striking out "Department of Medicine and Surgery" and inserting in lieu thereof "Veterans' Administration".

(b)(1) Subsections (a) through (e) of section 224 of the Public Health Service Act (42 U.S.C. 233) are repealed.

(2) Subsection (f) of such section is amended by striking out "(f)".

(c)(1) Subsections (a) through (e) of section 1089 of title 10, United States Code, are repealed.

(2) Subsection (f) of such section is amended by striking out "person described in subsection (a)" and inserting in lieu thereof "employee of the armed forces, the Department of Defense, the United States Soldiers' and Airmen's Home, or the Central Intelligence Agency".

(3) Subsection (g) of such section is amended --

(A) by striking out "and" at the end of clause (2);

(B) by redesignating clause (3) as clause (4); and

(C) by inserting after clause (2) the following new clause:

"(3) the Governor of the United States Soldiers' and Airmen's Home, in the case of an employee of the United States Soldiers' and Airmen's Home; and".

(4) Subsections (f) and (g) of such section are redesignated as subsections (a) and (b), respectively.

(d)(1) Subsections (a) through (e) of section 307 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2458a) are repealed.

(2) Subsection (f) of such section is amended --

(A) by striking out "(f)"; and

(B) by striking out "person described in subsection (a)" and inserting in lieu thereof "employee of the National Aeronautics and Space Administration".

(e)(1) Subsections (a) through (e) of section 1091 of the Foreign Service Act of 1946 (22 U.S.C. 817) are repealed.

(2) Subsection (f) of such section is amended by striking out "person to whom the immunity provisions of subsection (a) of this

section apply," and inserting in lieu thereof "employee of the Department of State (including the Agency for International Development)".

(3) Subsections (f) and (g) of such section are redesignated as subsections (a) and (b), respectively.

SEC. 1309. Section 2520 of title 18, United States Code, is amended by adding at the end thereof the following new sentence: "This section shall not apply to any civil cause of action against an officer or employee of the United States while acting within the scope of his office or employment."

SEC. 1310. Section 1810 of title 50, United States Code, is amended by adding at the end thereof the following new sentence: "This section shall not apply to any civil cause of action against an officer or employee of the United States while acting within the scope of his office or employment."

SEC. 1311. (a) Except as provided in subsection (b), the amendments made by this Act shall apply to all claims, civil actions and proceedings pending on, or filed on or after, the date of enactment of this Act.

(b)(1) With respect to any civil action or proceeding pending on the date of enactment against a Federal employee in his individual capacity, the plaintiff may, upon timely demand, (A) retain his right to a trial by jury if the demand for trial by jury is made prior to or on the date of enactment, or (B) elect a trial by jury if the time for election of a trial by jury pursuant to applicable law has not expired as of the date of enactment, except that in any case in which a trial by jury is elected under this paragraph, the

provisions of section 2674(b) of this title, as added by section 3 of this Act, which relate to liquidated damages, shall not apply.

(2) With respect to any civil action or proceeding pending against a Federal employee in his individual capacity on appeal, or pending against a Federal employee in his individual capacity in a State court in which the time for removal pursuant to section 2679(d) of this title has expired, the amendments made by this Act shall not apply, except that the United States shall be substituted for the defendant employee upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the action or proceeding arose.

(3) The provisions of section 2675(a) of this title shall not apply to a civil action or proceeding against a Federal employee in his individual capacity pending on the date of enactment of this Act, if the provisions of section 2675(a) were inapplicable to the action or proceeding when filed.

TITLE XIII
FEDERAL TORT CLAIMS ACT AMENDMENTS

Title XIII would amend Title 28, United States Code, to include under the Federal Tort Claims Act claims based upon a common law tort or tortious conduct arising under the Constitution of the United States founded upon a theory first enunciated by the Supreme Court in Bivens v. Six Unknown Named Agents of the Bureau of Narcotics, 403 U.S. 288 (1971). Section 1301 would provide that, in a Bivens cause of action, liability would be determined in accordance with Federal law. In non-Bivens or common law negligence actions brought under the Federal Tort Claims Act, liability would continue to be determined in accordance with applicable state law. Federal law would be utilized when the claim is based upon an alleged violation of the Federal Constitution because of the clearly unique federal nature of the claims and the Federal court genesis of the decisional law recognizing such a cause of action.

It is not contemplated that every wrong, or even every unconstitutional act, necessarily will rise to the level of a tort. The title makes no attempt to define the breadth or scope of those rights or constitutional deprivations which are compensable under a Bivens theory. Rather, that is left to the developing case law. It is clear, however, that no novel or unprecedented liability is intended to be visited upon the government. For example, a judicial finding that a given statute or regulation was unconstitutional would not give rise to a constitutional tort claim for the actions of the Congress in enacting the statute or the head of an agency

All of the provisions of the title are intended to apply to both present and former Federal employees (including members of the uniformed services) sued for acts committed or omissions occurring during the course of their Federal employment. */

Title XIII would also conform the administrative claim jurisdiction to include claims for Constitutional tort violations, in addition to broadening the jurisdiction of the United States District Court to entertain suits for constitutional violations under the Federal Tort Claims Act.

The title would also amend section 2672 of Title 28 by providing that, regardless of amount, all awards, compromises, or settlements made by an agency for tort claims arising under the Constitution would be effected only with prior approval of the Attorney General. To ensure that agencies apply uniform standards in determining whether conduct arises to the level of a constitutional tort, and that meritorious claims of constitutional wrongs are brought to the attention of the proper officials, the amendment to section 2672 would require the Attorney General or his designee to approve any proposed findings of constitutional injury prior to completion of the award, compromise, or settlement.

*/ Also intended to be covered are such officials as the Board of Regents of the Uniformed Services University of the Health Sciences for actions within the scope of their federal duties.

Also amended would be section 2674 of Title 28, the section of the Federal Tort Claims Act establishing the liability of the United States for the torts of its officers and employees. The first paragraph of section 2674 would be amended to make clear that it applies only to suits based upon common law as distinguished from constitutional torts. The second paragraph of section 2674 would remain unchanged.

A new subsection would be added to section 2674 which would make the United States liable for constitutional torts committed by its employees. Such liability would be determined by Federal law. The new paragraph compensates persons successfully asserting constitutional tort claims with liquidated - - i.e. minimum - - damages of \$1,000. In cases involving "continuing" violations, such as warrantless electronic surveillance or unlawful mail openings lasting several days or weeks, such persons would receive liquidated damages of either \$1,000 or a sum computed at the rate of \$100 for each day of violation up to a total of \$15,000, whichever is higher. This provision is drawn from section 2520 of Title 18, United States Code, which establishes a civil cause of action for unlawful interception of wire or oral communications and provides liquidated damages to successful plaintiffs. The primary remedy provided by section 2520 would thus be incorporated into the Federal Tort Claims Act to the extent conduct actionable under section 2520 constitutes tortious conduct under the Constitution.

The liquidated damages provision would cover all constitutional torts not just those torts, that may arise from the interception or disclosure of wire or oral communications. A successful plaintiff would be entitled to compensation for all actual damages to the extent they exceed liquidated damages. The term "actual damages" is intended to be synonymous with compensatory damages as that term is understood and applied in tort law.

Section 2674(b)(1), as amended, would provide that the United States shall be entitled to assert as a defense to a suit based on an alleged tort arising under the Constitution all defenses available to an individual employee prior to enactment of the legislation. This would include the absolute or qualified immunity of the employee, including his reasonable belief in the lawfulness of his conduct. In order for the defense of qualified immunity to be applicable, the reasonableness of the conduct and of the actor must be established. Thus the issues posed in litigating that defense go to the heart of the merits of the underlying conduct. The qualified immunity defense tests the actions of the offending official against the standard of reasonableness. If that test is met, it is questionable that a wrong has occurred in the traditional sense of tort law. More importantly, if that test is not at issue, the plaintiff loses his or her day in court concerning the conduct, motivation and wrongfulness of the federal officer or employee.

Litigation of the reasonableness defense also enables the public litigation process to uncover the true offender. He is unmasked because his actions were not reasonable.

Not only is he thus exposed and the public informed and the plaintiff vindicated, but disciplinary action is then triggered under the legislation, even if the case or claim is settled. Otherwise, the situation would be one of strict liability for liquidated damages where, for example, every successful litigant of a motion to suppress evidence in a criminal case, even if convicted of a crime, might be entitled to an award of damages. The conduct would never be really examined by the civil trial court and the true wrongdoer would more than likely be camouflaged within the larger group of cases settled or satisfied after judgment because the issues of good faith and reasonableness had been rendered irrelevant by legislation. Additionally, the public treasury would be taxed automatically with a large number of payments of questionable merit.

An additional interest to be protected in keeping the defense is the professional, reputational interest of the employees. It would be unfair to not permit him to defend his actions in the public forum by proving the reasonableness of the conduct.

Finally, on this point, it is noted that the Constitution was designed for flexibility and adaptation and is thus not free of ambiguity. Lawyers and judges cannot decide on its meaning or application with unanimity or prescience. It would not appear to be fair to ask street level federal employees to interpret it at their personal peril. The qualified immunity defense is needed to protect the action of an officer or employee who has acted reasonably in the face of an unclear constitutional mandate.

The United States would also be able to assert the absolute

A plaintiff, whether a private citizen or another federal employee, could not sue the allegedly offending official directly or personally under the common law or a constitutional theory. The title would instead enable the plaintiff to sue the United States or, perhaps, seek such administrative compensation as is available by law. As an example of the last point, there is decisional law to the effect that a government employee on the job may sue his fellow employee even though he has received Federal Employees Compensation Act benefits from the government pursuant to 5 U.S.C. §8101 et seq. cf. Bates v. Harp, 573 F.2d 930 (6th Cir. 1978). The Title would eliminate this type of duplicative suit. See Carr v. United States, 422 F.2d 1007 (4th Cir. 1970). If a plaintiff obtains compensation through FECA from the government, he could sue neither the government nor a fellow employee for additional compensation.

It is specifically noted that the amendments embodied in the title are not intended in any way to modify or imply Congressional abrogation of the rule of law that has evolved from the case of Feres v. United States, 340 U.S. 135 (1950). To the contrary, that doctrine is intended to be preserved and endorsed.

Finally, it is noted that the title is not intended to be a vehicle for collateral interdiction or attack upon a Federal agency's regulatory process, action, proceeding or procedures.